In the Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-974

CHARLES ROBERTSON, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioners contend that evidence obtained from a court-authorized wire interception should have been suppressed because the intercept order stated that the application for the order had been authorized by a specially designated Acting Assistant Attorney General when it actually had been personally authorized by the Attorney General. Petitioners also contend that Wharton's Rule requires reversal of their conspiracy convictions.

After a non-jury trial in the United States District Court for the Southern District of Florida, petitioners were convicted of conspiring to conduct an illegal gambling business, in violation of 18 U.S.C. 371. Petitioner Pinder was also convicted of the substantive offense of conducting an illegal gambling business, in violation of 18 U.S.C. 1955. Petitioners were sentenced as follows: Charles Robertson—execution of a sentence of confinement withheld, two years' probation, and a $5,000

fine; Donald Robertson—execution of a sentence of confinement withheld, three years' probation; McCray—execution of a sentence of confinement withheld, two years' probation, and a $1,000 fine; Lucas—committed to the custody of the Attorney General for no more than three months, imposition of sentence and confinement withheld pursuant to the Federal Youth Corrections Act (18 U.S.C. 5010(a)), and two years' probation; Pinder—$10,000 fines on both the conspiracy and the substantive counts. The court of appeals affirmed (Pet. App. A; 504 F.2d 289).

The undisputed facts establish that petitioners conspired to conduct, and that petitioner Pinder actually conducted, an illegal gambling operation, commonly called bolita. Evidence of this offense was derived in part from a court-authorized wire interception. Although the order under which the interception was conducted stated that the application therefor had been authorized by a specially designated Acting Assistant Attorney General, the application actually had been personally authorized by the Attorney General.

1. Petitioners contend (Pet. 7-11) that the evidence derived from the court-ordered wire interception should have been suppressed under 18 U.S.C. 2518(10)(a)(ii) because the order authorizing the interception was insufficient on its face. They argue that an Acting Assistant Attorney General "does not possess the requisite statutory authority to authorize wiretap applications" (Pet. 9) and that an intercept order identifying an Acting Assistant Attorney General as the person who authorized the application is therefore facially deficient. That deficiency, they claim, requires suppression of the evidence notwithstanding that the application was in fact authorized by the Attorney General.

We reject petitioners' premise that an Acting Assistant Attorney General may not, under 18 U.S.C. 2516(1), lawfully authorize an application for an intercept order. See *United States* v. *Pellicci,* 504 F.2d 1106 (C.A.

1), certiorari denied, January 20, 1975, No. 74-636. In any event, it would not follow that suppression is required. Since it is undisputed that the Attorney General actually authorized the application at issue here, it cannot be said that there was a "failure to satisfy any of those statutory requirements that directly and substantially implement the congressional intention to limit the use of intercept procedures" (*United States* v. *Giordano*, 416 U.S. 505, 527). As the court of appeals correctly stated, "[c]ertainly the congressional intent is satisfied when the head of the Justice Department personally reviews the proposed application and determines that the situation is appropriate for employing this extraordinary investigative measure" (Pet. App. 8). See also *United States* v. *Acon*, C.A. 3, No. 74-1766, decided March 6, 1975.

Nothing in this Court's decisions in *Giordano* and in *United States* v. *Chavez*, 416 U.S. 562, supports petitioners' contention that evidence obtained pursuant to a facially insufficient order must be suppressed "whether or not the violations substantially and directly affect the fulfillment of the Congressional intent in enacting Title III" (Pet. 9). That contention was expressly rejected by the Third Circuit in *United States* v. *Acon, supra*, a case that is indistinguishable from the present one. The court there correctly held that "(10)(a)(ii) suppression is not required for every minor insufficiency" (slip op. 10).

2. Petitioners also contend that the conspiracy conviction was a "duplication" of the substantive conviction under 18 U.S.C. 1955 and that the conspiracy conviction therefore must be reversed (Pet. 2). Only petitioner Pinder, however, was convicted of both the conspiracy and the substantive offense;[1] the other petitioners were convicted

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[1]Pinder was given cumulative fines on the two counts.

of the conspiracy alone. In any event, the contention is now foreclosed by this Court's decision in *Iannelli* v. *United States,* No. 73-64, decided March 25, 1975, which holds that a person may properly be indicted, convicted, and punished separately both for violating Section 1955 and for conspiring to commit the violation.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

MARCH 1975.